

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97133; File No. SR-Phlx-2023-08)

March 14, 2023

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Options 7, Section 4 Regarding Multiply Listed Options Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 1, 2023, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Phlx’s Pricing Schedule at Options 7, Section 4, “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY).”

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Phlx proposes to amend its Pricing Schedule at Options 7, Section 4, “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY).”

Recently, Phlx established a QCC Growth Tier Rebate within section B of Options 7, Section 4 to encourage Phlx members and member organizations to transact a greater number of QCC Orders on Phlx. In order to qualify for the QCC Growth Tier Rebate, a member’s or member organization’s total floor transaction,³ and electronic QCC Orders and Floor QCC Orders volume (“QCC transaction volume”) must exceed 12,500,000 contracts in a given month. In addition to the aforementioned criteria, the member’s or member organization’s respective Phlx House Account⁴ must execute QCC transaction volume of 250,000 or more contracts in excess of the member’s or member organization’s QCC transaction volume in January 2023. For

³ The term “floor transaction” is a transaction that is effected in open outcry on the Exchange’s trading floor. See Phlx Options 7, Section 1(c). Of note, the term “floor transaction” is more broadly defined than the term “Open Outcry Floor Transaction” which is discussed herein and is a subset of the term “floor transaction.”

⁴ Each Phlx member or member organization is required to establish one Phlx House Account with the Exchange’s Membership Department. Only one Phlx House Account is required to transact business on Phlx. The Exchange assesses a \$50.00 a month account fee for this account as provided for within Options 7, Section 8A. A Phlx member or member organization has the option of acquiring multiple Phlx House Accounts depending on a member’s or member organization’s business model and how they elect to organize their business.

members or member organizations with no QCC transaction volume in January 2023, the QCC transaction volume, in their respective Phlx House Account, must be 250,000 or more contracts in a given month.

Further, a member or member organization may alternatively achieve the QCC Growth Tier Rebate if a member's or member organization's Open Outcry Floor Transaction⁵ volume in a given month exceeds 500,000 contracts. In addition to the aforementioned criteria, a member's or member organization's respective Phlx House Account must execute QCC transaction volume of 2,500,000 or more contracts in excess of the member's or member organization's QCC transaction volume in January 2023. For members or member organizations with no QCC transaction volume in January 2023, the QCC transaction volume, in their respective Phlx House Account, must be 2,500,000 or more contracts in a given month.

Today, the Exchange pays the QCC Growth Tier Rebates per Phlx House Account. Specifically, the Exchange pays a \$0.20 per contract QCC Growth Tier Rebate on a QCC Order comprised of a Customer or Professional order on one side and a Lead Market Maker, Market Maker, Broker-Dealer, or Firm order on the other side. Further, the Exchange pays a \$0.26 per contract QCC Growth Tier Rebate on a QCC Order comprised of a Lead Market Maker, Market Maker, Broker-Dealer, or Firm order on one side and a Lead Market Maker, Market Maker, Broker-Dealer, or Firm order on the other side.⁶

⁵ The term "Open Outcry Floor Transaction" includes all transactions executed in open outcry on Phlx's trading floor except: (1) dividend, merger, short stock interest, reversal and conversion, jelly roll, and box spread strategy executions as defined in this Options 7, Section 4; (2) Cabinet Transactions as defined in Options 8, Section 33; and (3) Customer-to-Customer transactions.

⁶ Members and member organizations are entitled to one QCC Rebate in a given month, either the QCC Rebate in Section A or the QCC Growth Tier Rebate in Section B in a given month, but not both.

At this time, the Exchange proposes to continue to pay the QCC Growth Tier Rebate on all qualifying executed electronic QCC Orders, as defined in Options 3, Section 12, and Floor QCC Orders, as defined in Options 8, Section 30(e), except where the transaction is either: (i) Customer-to-Customer; (ii) Customer-to-Professional; (iii) Professional-to-Professional; or (iv) a dividend, merger, short stock interest, reversal and conversion, jelly roll, and box spread strategy executions (as defined in Options 7, Section 4).

The proposed exclusions are similar to the exclusions for payments on QCC Rebates in section A of Options 7, Section 4. Of note, currently, QCC Growth Tier Rebates are not paid on Customer-to-Customer, Customer-to-Professional, or Professional-to-Professional QCC Orders because the QCC Growth Tier Rebate specifies it is only paid on a QCC Order comprised of a Customer or Professional order on one side and a Lead Market Maker, Market Maker, Broker-Dealer, or Firm order on the other side, and a QCC Order comprised of a Lead Market Maker, Market Maker, Broker-Dealer, or Firm order on one side and a Lead Market Maker, Market Maker, Broker-Dealer, or Firm order on the other side. The Exchange is including these exclusions to the QCC Growth Tier Rebate to mirror the exclusions within QCC Rebates in section A.

Notwithstanding, the limitation on eligible orders to receive a QCC Growth Tier Rebate, the Exchange believes that the QCC Growth Tier Rebate will continue to encourage market participants to send QCC orders to Phlx for execution in an effort to earn higher QCC Rebates.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁸ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁹

Likewise, in NetCoalition v. Securities and Exchange Commission¹⁰ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.¹¹ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . .

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4) and (5).

⁹ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁰ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹¹ See NetCoalition, at 534 - 535.

. to be made available to investors and at what cost.”¹²

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹³ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange’s proposal to amend the QCC Growth Tier Rebate to pay the QCC Growth Tier on all qualifying executed electronic QCC Orders except where the transaction is either Customer-to-Customer; Customer-to-Professional; Professional-to-Professional; or a dividend, merger, short stock interest, reversal and conversion, jelly roll, and box spread strategy executions (as defined in Options 7, Section 4) is reasonable because despite the limitation on eligible orders to receive a QCC Growth Tier Rebate, the Exchange believes that this rebate will continue to provide incentives for members and member organizations to engage in substantial amounts of trading activity which would serve to bring additional open outcry liquidity to the trading floor and additional QCC Order Flow to Phlx. This incentive may also encourage members and member organizations to commence sending such order flow to Phlx for the

¹² Id. at 537.

¹³ Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

opportunity to earn this rebate. The proposed exclusions are similar to the exclusions for payments on QCC Rebates in section A of Options 7, Section 4.¹⁴

The Exchange's proposal to amend the QCC Growth Tier Rebate to pay the QCC Growth Tier on all qualifying executed electronic QCC Orders except where the transaction is either Customer-to-Customer; Customer-to-Professional; Professional-to-Professional; or a dividend, merger, short stock interest, reversal and conversion, jelly roll, and box spread strategy executions (as defined in Options 7, Section 4) is equitable and not unfairly discriminatory because any member or member organization may qualify for the QCC Growth Tier Rebate. Further, the Exchange will uniformly apply the proposed exceptions for eligible QCC Orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Inter-market Competition

The proposal does not impose an undue burden on inter-market competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate

¹⁴ Of note, currently, QCC Growth Tier Rebates are not paid on Customer-to-Customer, Customer-to-Professional, or Professional-to-Professional QCC Orders because the QCC Growth Tier Rebate specifies it is only paid on a QCC Order comprised of a Customer or Professional order on one side and a Lead Market Maker, Market Maker, Broker-Dealer, or Firm order on the other side, and a QCC Order comprised of a Lead Market Maker, Market Maker, Broker-Dealer, or Firm order on one side and a Lead Market Maker, Market Maker, Broker-Dealer, or Firm order on the other side. The Exchange is including these exclusions to the QCC Growth Tier Rebate to mirror the exclusions within QCC Rebates in section A.

opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

Intra-market Competition

The proposed amendments do not impose an undue burden on intra-market competition. In terms of intra-market competition, the Exchange does not believe that its proposals will place any category of market participant at a competitive disadvantage. The Exchange believes that the proposed amendments to the QCC Rebate Growth Tier Rebates will continue to provide incentives for members and member organizations to engage in substantial amounts of trading activity which would serve to bring additional open outcry liquidity to the trading floor and additional QCC Order Flow to Phlx.

The Exchange's proposal to amend the QCC Growth Tier Rebate to pay the QCC Growth Rebates on all qualifying executed electronic QCC Orders except where the transaction is either Customer-to-Customer; Customer-to-Professional; Professional-to-Professional; or a dividend, merger, short stock interest, reversal and conversion, jelly roll, and box spread strategy executions (as defined in Options 7, Section 4) does not impose an undue burden on competition because any member or member organization may qualify for the QCC Growth Tier Rebate. Further, the Exchange will uniformly apply the proposed exceptions for eligible QCC Orders.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.¹⁵

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2023-08 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2023-08. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

¹⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-Phlx-2023-08 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

Sherry R. Haywood,
Assistant Secretary.

¹⁶ 17 CFR 200.30-3(a)(12).